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89- 1397

Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

HUMBERTO SERGIO GARZA,
GARY BEN JORDAN & NOE MUNIZ, PETITIONERS

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

February 25, 1990

QUESTIONS PRESENTED FOR REVIEW

First: The Court of Appeals reversibly erred in not sustaining petitioners' point of error no. 3, which read (Pet.App. 32):

> As to each appellant, the district court reversibly erred in imposing a $50.00 special monetary assessment pursuant to 18 U.S.C. 3013 (1R. 168-171b), since that 1984 revenue——raising special assessment measure, which originated in the Senate, is in violation of the U.S. Constitution's Article 1, § 7, cl. 1, which provides all revenue bills must originate in the House.

Second: The Court of Appeals reversibly erred in finding harmless under Federal Rule Criminal Procedure 52(a) the prosecutor's improper statement during final jury argument (18R. 2000), since the Government failed to prove beyond a reasonable doubt that the verdict was not affected by that prosecutorial unconstitutional remarking that the trial judge would have directed verdict of acquittal and the case would not be with the jury if there were not

sufficient evidence, if believed, from which the jury could convict.

Third: The Court of Appeals erred in not sustaining petitioner's point of error no. 2, which read (Pet.App. 32):

> The district court erred on failing to grant appellant's mistrial request upon jury misconduct (16R. 1845-1854). (See also 13R. 1239-1245; 14R. 1499-1501; 17R. 1806-1854; 16R. 1727-1731).

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit were: The United States of America and Petitioners Humberto Sergio Garza, Gary Ben Jordan, and Noe Muniz.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioners were represented at trial by attorney Joe A. Cisneros and at the Court of Appeals by attorneys Joseph A. Connors III, Joe A. Cisneros and Dorina Ramos.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

HUMBERTO SERGIO GARZA,
GARY BEN JORDAN, and NOE MUNIZ,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

HUMBERTO SERGIO GARZA, GARY BEN JORDAN, and NOE MUNIZ petition for review of the judgment, opinion and rehearing denial of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment is unreported (Pet.App. 13-25). The appeals court's opinion and rehearing denial (Pet.App. 3-12) are reported. United States

v. Garza, 887 F.2d 55 (CA5 1989), rehearing denied (1989).

JURISDICTION

The court of appeals entered its opinion on October 12, 1989 (Pet.App. 3-10). That court denied Garza, Jordan and Muniz' timely petition for rehearing on November, 1989 (Pet.App. 11-12). Within the 90 day period following November 27, 1989, this petition was mailed for filing by the Clerk of this Court. Supreme Court Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article 1, Section 7, Clause 1 of the United States Constitution reads:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

RELEVANT STATUTES

18 U.S.C. 924(a) provided from 1971 through November 14, 1986 as follows:

> (a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

18 U.S.C. 3013 reads:

> (a) The court shall assess on any person convicted of an offense against the United States—
>
> (1) in the case of a misdemeanor—
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony—
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

RELEVANT RULES

Federal Rule of Criminal Procedure 52 reads:

(a) Harmless Error. Any error, defect, irergularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

A. Appeals Court's Jurisdiction

The court of appeals had jurisdiction of petitioners' direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History In District Court

Humberto Sergio Garza, Gary Ben Jordan, and Noe Muniz were charged together with Margarito Alvarez, Urbano Arredondo III, Jose Fernando Moraida, Victor Munoz, Fernando Pena, and Ciro Angel Rivera in a 62 count indictment (1R. 1 at 1-18). Count 1 alleged a conspiracy to make false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 371 (1R. 1

at 1-10). Against Gary Ben Jordan, Counts 2-19 alleged making false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 2 (1R. 1 at 10-12). Against Humberto Sergio Garza, Counts 20-41 alleged making false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 2 (1R. 1 at 12-14). Against Noe Muniz Counts, 42-59 alleged making false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 2 (1R. 2 at 14-16). The case proceeded to a jury trial before the Honorable Filemon B. Vela, presiding judge of the McAllen Division of the United States District Court for the Southern District of Texas. Jury selection was on March 4, 1988 (2R. 1). On March 21, 1988, the trial on the merits was to begin (2R. 27). It began the next day (3R. 58).

Humberto Sergio Garza was found guilty as to Counts 1, 20-23, and 25-40 on April 1, 1988 (1R. 170). Mr. Garza's total sentence imposed was 10 years in custody of the Attorney General and a $21,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for five years probation with supervision, to commence upon release from confinement (1R. 170). Pursuant to 18 U.S.C. 3013, the Court further imposed a $50 special monetary assessment on each of Counts 1, 22, 23, 26, 30-33, 37, 39, and 40, for a total of $550 (1R. 169). On March 28, 1988, Counts 24 and 41 were dismissed on the Government's own motion (1R. 169).

Gary Ben Jordan was found guilty as to Counts 1-18 on April 1, 1988 (1R. 171a). Mr. Jordan's total sentence was 10 years custody of the Attorney General and a $18,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for

five years probation with supervision, to commence upon release from confinement (1R. 171a). Pursuant to 18 U.S.C. 3013, the Court further imposed a $50 special monetary assessment on each of Counts 1-3, 7, 8, 10, and 14-18, for a total of $550 (1R. 171b). Count 19 was dismissed on the Government's motion on March 28, 1988 (1R. 171b).

Noe Muniz was found guilty as to Counts 1, and 42-59 on April 1, 1988 (1R. 172a). Mr. Garza's total sentence was 10 years custody of the Attorney General and a $19,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for five years probation with supervision, to commence upon release from confinement (1R. 172a). Pursuant to 18 U.S.C. 3013, the Court further imposed a $50 special monetary assessment on each of Counts 1, 43, 51-57, and 59, for a total of $500 (1R. 172b). This timely appeal followed.

C. Statement of the Facts: Defendant's Case

Mr. Muniz took the stand on his own behalf and testified to the effect that he did not in any way conspire with Mr. Humberto Sergio Garza or with Mr. Gary Ben Jordan or with Mr. Fernando Pena or with Mr. Victor Munoz or with Mr. Jose Fernando Moraida or with Mr. Margarito Alvarez, or with anybody else to have people come and sign the forms in blank and use them later to sell guns to people not eligible to buy (16R. 1619).

Mr. Garza also took the stand on his own behalf and testified to the effect that he was not involved in any conspiracy in 1981, or from March 1982 to July 1984, or from December 1982 to April 1986, and that he was not involved in having any forms signed in blank (17R. 1746, 1749, 1750-1752, 1756, 1759, 1768).

Mr. Jordan also took the stand on his own behalf and testified to the effect that he did not conspire to do anything the government is alleging in the indictment (16R. 1700).

D. Prosecutor's Improper Closing

During the course of the final argument, the following occurred when the prosecutor made the following statements (18R. 2000-2002):

> Mr. Ramirez indicated that there was not enough evidence from which any jury could convict the defendant, Moraida, and that if any jury convicted him, they would be convicting an innocent man. I am here to assure you that if there were not sufficient evidence, Judge Vela would have directed a verdict of acquittal and this matter would not --
>
> MR. YZAGUIRRE: We ask for mistrial on that, Your Honor. Now that is --
>
> THE COURT: Objection is overruled. Motion is denied. Ladies and gentlemen of the jury, any time that the attorneys make reference to the law and it is not consistent with that which I give

you, you are to disregard what the attorneys told you.

MR. CISNEROS: With all due respect to this honorable jury, I strongly object on the grounds that he has implanted in the minds of these jurors the Court has determined that there is sufficient evidence to convict, Your Honor. At this time we ask the Court to instruct the jury to disregard that comment.

THE COURT: Request is denied.

MR. CISNEROS: Now we move for a mistrial.

THE COURT: Request is denied.

MR. YZAGUIRRE: Note our exception.

MR. MILNER: I feel compelled to complete my remark because it was incomplete. Were there not sufficient evidence, which if you believe it to be true, could support a verdict of guilty in this case, the matter would not be before you. Now, whether you believe it or not --

MR. CISNEROS: Again object.

MR. YZAGUIRRE: Please caution the U.S. Attorney --

MR. CISNEROS: I ask the Court again to instruct the jury to disregard vigorously and also, Your

Honor, at this time move for mistrial?

THE COURT: Denied. Objection is overruled.

MR. CISNEROS: My request for mistrial is denied also?

THE COURT: Denied.

E. The Prejudiced Jury

On March 28, 1988, juror Tabarez met with the Judge Vela in chambers, and in the absence of counsel, discussed some information relayed to her by a friend about a possible bribe. That chambers colloquy follows (13R. 1239-1244):

JUROR TABAREZ: I thought -- I didn't want to. Nobody had approached me. Just my friend told me -- told me that--

THE COURT: Don't be concerned about it. Don't be nervous. Don't worry about it. I just want to assure you did the correct thing, because it is very important that we decide things exclusively from evidence, you understand, in the case devoid of any other influences. That is the thing I want to question you about. Did this experience in any way affect your ability to be fair and impartial?

JUROR TABAREZ: Oh, no. No. No. No.

THE COURT: Can you make up your mind from the evidence --

JUROR TABAREZ: Oh, yes.

THE COURT: -- in the case?

JUROR TABAREZ: I told my friend not even the fourteen million dollars that he claims he has on his inventory would change my mind to go against -- I am fair. If he is guilty he is going to be found guilty. If he is not, he is going to be --

THE COURT: I have to ask you some questions obviously. Number one, who is your friend?

JUROR TABAREZ: Maria Howard.

THE COURT: Where does she live?

JUROR TABAREZ: She lives in Rio Grande.

THE COURT: Rio Grande?

JUROR TABAREZ: Yes.

THE COURT: Is she related to you?

JUROR TABAREZ: No, she is just a friend.

THE COURT: Are you from Rio Grande?

JUROR TABAREZ: No, I am from Mission.

THE COURT: What is it your friend said?

JUROR TABAREZ: She said -- we were at the bingo game. At the bingo. I go to the bingo a lot when I have a chance. I haven't had a chance all week, so I went yesterday. We all sit together.

She said, "Oh, I have got something to tell you." I was busy. I had a cup of coffee I had to take to someone.

I said, "Okay, I will be right back."

And she said, "You know I have this friend." I don't know where she said she was from. I think she said Rio Grande. She didn't tell me her name.

She said, "This friend is going to the same jury you are going," or something like that. She said something like that.

She is not a witness or nothing. Just comes to listen.

THE COURT: Spectator?

JUROR TABAREZ: Yes. And she said, "I have a friend that's going. She is a juror. My friend told her because she knows I come to the"--

THE COURT: But the person to whom this Howard was speaking is not a juror?

JUROR TABAREZ: No. No. No. No.

THE COURT: And did she give you the name?

JUROR TABAREZ: No. I didn't ask her.

THE COURT: What did she say the friend told her?

JUROR TABAREZ: She said, "Oh, you have a friend. I wonder if your friend would sell herself." Not sell. Vendese.

THE COURT: Lend herself.

JUROR TABAREZ: Yes. "And she would make a lot of money."

THE COURT: Vendese means sell.

JUROR TABAREZ: Turn for the other side. "She would make a lot of money."

And my friend told her, "I don't think so. I don't think she would want that."

Then she came to tell me. What I told her, just joking, I said not even the fourteen million Mr. Pena has would make me change to their side," you know. "If he is found guilty, he is going to be found guilty. If he is going to be found

not guilty, he will be found not guilty. All depends on what they have to say."

THE COURT: Do you have any problems?

JUROR TABAREZ: No.

THE COURT: Has it affected you?

JUROR TABAREZ: No, sir. I just thought I would report it.

THE COURT: You did the correct thing. Let me ask you something else. All right. This information that you received sort of indicates somebody who may not even know, you understand, the persons in this case, who may not have anything to do with it, but may have been from one side.

JUROR TABAREZ: You know, I told her, I asked her, "Is she the family?" She said, "No. No. No. She is just just" --

THE COURT: Here is what my question is to you: Did this in any way affect your ability to be fair and impartial?

JUROR TABAREZ: Oh, no. No. No, sir. I am listening to the witnesses.

THE COURT: Only the evidence?

JUROR TABAREZ: Yes.

THE COURT: Let me go a little further. All right. The suggestion comes from one side of the parties in this case. The Government is one side and the defendants is one side.

JUROR TABAREZ: I know.

THE COURT: Obviously it comes from the defendants. Would you hold that against them --

JUROR TABAREZ: No.

THE COURT: -- the fact that you have been approached?

JUROR TABAREZ: No. I haven't been approached, you know. My friend just told me.

THE COURT: So it hasn't affected you in any way?

JUROR TABAREZ: No.

THE COURT: You have done the correct thing. Do you happen to have Mrs. Howard's address?

JUROR TABAREZ: No, I sure don't. I can get it for you.

THE COURT: We will do that subsequently. Right now just lend yourself and continue to keep an open mind in the case.

JUROR TABAREZ: Okay.

THE COURT: Thank you so very much. Thank you. You did the correct thing, ma'am.

Later on outside the jury's presence, Judge Vela informed the defendants and all counsel as to what had occurred, and as to his finding that it had not tainted juror Tabarez. That colloquy follows (14R. 1499-1501):

> THE COURT: ...
>
> Now gentlemen, it is my duty to report a matter that came to my attention that I made a record of. And I am glad that the spectators are here. For I am not going to tolerate any more of this kind of nonsense. And I am going to deal with it directly. I have made a record of it, it is going to follow this case. It is preserved. I am satisfied that it has not tainted a juror.
>
> I have received information, only myself. I have made a record, placed of record, to the effect that a juror was approached by a person who had been approached who was a spectator in this case. I'm not saying it's for the Government or for the defendant. I am not saying there is anything -- it's anybody that's involved in this case. This is the third incident that has some similarity to this case being affected by outside influences. I had a Grand Jury situation regarding some tampering of witnesses. I am not saying any of the defendants had

anything to do with it. I had a situation, of course, which you had no control over of the newspaper that I had to deal with, and now I have this matter involving a juror.

I am not going to sequester a jury. But if I get one more incident of this type, I am telling you now, I will declare a mistrial and I will sequester everybody until we try this case in Houston, Texas. I am not going to tolerate any more of that kind of nonsense. I am going to do what is necessary to make sure that justice is done.

I am not directing myself nor addressing myself to any individuals, nor assessing responsibility for this kind of thing. You are simply being advised and informed of something that is of record that is not going to be tolerated. You do what you think is necessary. I have already told you what I am going to do.

MR. CISNEROS: May it please the Court, based on that information on the record, now come the defendants, Humberto Sergio Garza, Noe Muniz, Ben Jordan, and Fernando Pena, and move for a mistrial, Your Honor, on the grounds, whatever may have happened, I must conclude you know that maybe the jury is prejudiced now and has been inflamed.

THE COURT: Your motion will be denied. You preserve your exception. I've just told you what

I am going to do if we get one more incident.

Prior to the end of trial testimony, outside the presence of the defendants and defense counsel, Judge Vela asked juror Tabarez if she had made this information known to any of the other jurors (17R. 1813). She said she had. Judge Vela then questioned each and every juror as to the information made known to them, and as to their ability to remain fair and impartial (17R. 1815-1843). Judge Vela was satisfied with the jurors' responses and with their ability to remain fair and impartial (17R. 1843-1844). Judge Vela denied defense counsel's request for a mistrial (17R. 1845, 1846, 1854). Judge Vela also allowed juror Taberez to serve on the deliberating jury that convicted (17R. 1847; 18R. 2042).

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial

discretion and allow the writ in this case because:

(a) as to the first question presented here, the Fifth Circuit Court of Appeals has rendered a decision consistent with United States v. Herrada, 887 F.2d 524 (CA5 1989) but in conflict on the same matter with the decision in United States v. Munoz-Flores, 863 F.2d 654 (CA9 1988), cert. granted, ___ U.S. ___, 110 S.Ct. 48, 107 L.Ed.2d 17 (1989);

(b) as to the second question presented here, the Court of Appeals relied exclusively on an analysis under Federal Rule Criminal Procedure 52(a) in conflict with the applicable Chapman decisions of this Court, such as Satterwhite v. Texas, 486

U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); and

(c) as to the second and third questions presented here, not only has the Court of Appeals sanctioned a lower court departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, but the Court of Appeals has also decided important questions of federal law which have not been, but should be, settled by this Court.

ARGUMENT ON FIRST QUESTION

In an effort to not lengthen this petition, petitioners adopt in toto the dispositive opinion on this issue in United States v. Munoz-Flores, 863 F.2d 654 (CA9 1988), cert. granted, ___ U.S. ___, 110 S.Ct. 48, 107 L.Ed.2d 17 (1989) as well as

all the arguments made by respondent Munoz Flores in this Court's cause no. 88-1932. Of course, petitioners recognize that that Ninth Circuit decision also conflict with not only the decision herein but also the decision in United States v. Herrada, 887 F.2d 524 (CA5 1989). This constitutionality question about 18 U.S.C. 3013 was not before the Supreme Court in Ray v. United States, ___ U.S. ___, 107 S.Ct. 2093, 95 L.Ed.2d 693 (1987)[where the Court of Appeals improperly invoked "concurrent sentence doctrine" since defendant was not serving concurrent sentences where each sentence contained its own $50.00 special monetary assessment].

ARGUMENT ON SECOND QUESTION

This issue's resolution turns on which harm analysis is applicable here: Chapman or Federal Rule Criminal Procedure 52(a).

The Court of Appeals found the prosecutor's closing argument in question to be in error but to be harmless. The Court

of Appeals found that the improper argument applied not to these Petitioners but to another trial co-defendant. In so ruling, the Court of Appeals ignored jury common sense that the trial court would have acquitted for these Petitioners "if there were not sufficient evidence * * * * which if you believe it to be true, could support a verdict of guilt in this case, the matter would not be before you." (18R. 2000-2002).

Petitioners possessed a valuable trial right for the trial jury not to be told of the district or appellate court's acquittal obligations [under Federal Criminal Rule Procedure 29 and Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978)]. Such jury argument must impinge on the due process rights to a fair and impartial jury guaranteed Petitioners by the Fifth and Sixth Amendments to the U.S. Constitution.

Such holding is just one step away from this Court's Eighth Amendment holding that a prosecutor reversibly errs in arguing to a capital sentencing jury that theirs is not the final decision but that their job is reviewable since it minimizes the jury's role and diminishes its sense of responsibility. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Petitioners conclude that while each Petitioner faced numerous counts each with a five year potential sentence, that does not mean that Petitioners were owed by the Government either less due process or less fair of a jury since death was not an available punishment.

Petitioners conclude that when viewed in the context of the trial as a whole and each Petitioner's trial testimony asserting innocence, this Court cannot say beyond a reasonable doubt that the challenged

prosecutorial argument (about acquittal by the district court or the case would not have been presented to the jurors) did not affect the jury's decision to convict. See Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988)[reversal since the state had not proved beyond a reasonable doubt that the error complained of did not contribute to the verdict]. See also United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)[trial court conviction affirmance since under "plain error" standards the challenged improper arguments by the prosecutor did not undermine the jury trial's fairness].

It is well settled that no attorney including prosecutors may express personal opinion as to the credibility of any witness, United States v. Rodarte, 596 F.2d 141 (CA5 1978); United States v. Morris, 568 F.2d 396 (CA5 1978), or comment on the evidence, United States v. Kopituk, 690 F.2d

1289 (CA11 1982). It will at all times be improper for a prosecutor to suggest that a defendant is guilty from the mere fact that he has been indicted or is being prosecuted. United States v. Bess, 593 F.2d 749 (CA6 1979).

It is absolutely inexcusable for a prosecutor to make any prejudicial statement. United States v. Bess, supra. The duty of a prosecutor is clear. The Supreme Court in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) states it quite clear:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he

> is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Justice Douglas stated it just as clearly in his dissenting opinion in Donnelly v. DeChristoforo, 416 U.S. 637, 648-649, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), saying:

> The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.

Here, the improper statement of the prosecutor cannot be ruled as harmless. Just as it is improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted, it would also be improper for a prosecutor to suggest that there is sufficient evidence for a conviction since the judge failed to a give a judgment of

acquittal (18R. 2000), as to any accused on trial. The trial judge's conduct as to one defendant (whose case is being submitted to the jury for resolution rather than judicially acquitted) must in the jury's mind be equivalent to the trial judge's decision not to acquit other co-defendants but to also submit their cases to the jury. Compare, United States ex rel. Clark v. Fike, 538 F.2d 750, 759 (CA7 1976), cert. denied, 429 U.S. 1064, 97 S.Ct 791, 50 L.Ed.2d 781 (1977); United States v. Bowen, 500 F.2d 41 (CA6 1974), cert. denied, 419 U.S. 1003, 95 S.Ct. 322, 42 L.Ed.2d 278 (1974); United States v. Lamerson, 457 F.2d 371, 372 (CA5 1972). The prosecutor's statements amounted to the same thing as advising the jury that the judge is expressing his opinion that the defendants are guilty. See United States v. Diharce-Estrada, 526 F.2d 637 (CA5 1976). The prosecutor added this statement: "Were

there not sufficient evidence, which if you believe it to be true, could support a verdict of guilty in this case, the matter would not be before you." (18R. 2001). Such a statement did not in any way lessen the damage already done.

Although requested by defense counsel, the court refused to give any kind of instruction and failed to rule on the timely objection. Mr. Garza, Mr. Jordan, and Mr. Muniz's substantial right to a fair trial was substantially affected by the prosecutor's statement. The jury convicted on the prosecutor's statement that had there not been enough evidence to convict, the judge would have already acquitted the defendants. Mr. Muniz, Mr. Garza, and Mr. Jordan denied any involvement in any conspiracy (16R. 1619, 1700; 17R. 1746, 1749, 1750-1752, 1756, 1759, 1768). This Court can not say that the evidence is overwhelming. The jury deliberated for two

days. The jury's deliberations did not go smoothly (19R.). The jury sent out several notes. The last one expressed that they did not believe they could continue deliberations (19R. 2044, 2047, 2058, 2060, 2065, 2066). Accordingly, justice demands that the convictions be reversed.

ARGUMENT ON THIRD QUESTION

It has long been held that unauthorized third party extra-record contact, with a juror is "deemed presumptively prejudicial." Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). The government may rebut the presumption by showing that the communication was harmless. Sher v. Stoughton, 666 F.2d 791, 793 (CA2 1981). To make such a determination, it is necessary to consider not only the content of the communication itself, but also "the other information of which the jurors were properly aware." Sher v. Stoughton, supra at 794. Judge Friendly in United States ex rel.

Owen v. McMann, 435 F.2d 813 (CA2 1970) stated it as follows:

> "The touchstone of decision in a case such as we have here is thus not the mere fact of infiltration of some molecules of extrarecord matter, ... but the nature of what had been infiltrated and the probability of prejudice."

The communication of a potential bribe to all members of a jury is no petty matter. The bribe could only be coming from one of the accuseds' supporters. This information was conveyed to twelve of the fourteen jury members by juror Tabarez and inferentially to the remaining two jurors by Judge Vela's inquiries. It cannot possibly be conceived that each member of the jury remained unprejudiced in all ways. Any rational jury member would conceive this "bribe talk" to be some indication or evidence of guilt.

The Sixth Amendment guarantees a defendant a right to a trial by an impartial jury. No right touches more the heart of fairness in a trial. That fact that there

was no bribe, no threat, no invasion of the jury deliberations, does not eliminate the fact that something went sour, and that a mistrial should have been declared. See Stockton v. Commissioner of Virginia, 852 F.2d 740, 743 (CA4 1988). "Private communications, possibly prejudicial, between jurors and third person, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892).

Anytime the issue is raised as to the propriety of a jury's conduct, it is the responsibility of the trial judge to make sure the verdict is not in any way prejudiced by improper outside influences. Sheppard v. Maxwell, 384 U.S. 333, 362-363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). This may be accomplished by means of in

camera juror interviews, and it will be the duty of the trial court to judge the credibility of each juror, distinguish the believable from the unbelievable, and determine the content, cumulative nature, and extent of the outside information that reached the jury room. See Smith v. Phillips, 455 U.S. 209, 216, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1981); Williams v. Griswald, 743 F.2d 1533, 1538 (CA11 1984). In the case at hand, each and every juror gave Judge Vela the proper answer as to their capability of being fair and impartial, and on this alone Judge Vela based his findings. It may well be that each juror believed that they could be fair and impartial, but it may also well be that one juror may have been prejudiced by this information. This being the case, justice would demand that the convictions be reversed.

EDITOR'S NOTE

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89- 1397

Supreme Court, U.S.
FILED
FEB 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

HUMBERTO SERGIO GARZA,
GARY BEN JORDAN & NOE MUNIZ, PETITIONERS

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION

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ATTORNEYS FOR PETITIONERS

February 25, 1990

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2485

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V.

HUMBERTO SERGIO GARZA,
GARY BEN JORDAN,
NOE MUNIZ,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

October 12, 1989

Before CLARK, Chief Judge, GEE and SMITH. Circuit Judges. GEE, Circuit Judge:

Today we decide whether certain improper statements made by a prosecutor during the closing argument to a jury were so prejudicial as to require reversal.

Facts

The appellants were convicted and sentenced to terms of imprisonment for conspiring to make and for making false statements and representations to federally licensed firearms dealers in violation of 18 U.S.C. Section 924(a) and 2. They appeal, claiming that certain comments made by the prosecuting attorney during closing argument were improper and prejudicial.

In response to an argument made by the lawyer for defendant Moraida -- who is not a party to this appeal -- the prosecutor argued and defense counsel objected as follows:

> [MR. MILNER]: Mr. Ramirez indicated that there was not enough evidence from which any jury could convict the defendant, Moraida, and that if any jury convicted him, they would be convicting an innocent man. I am here to assure you that if there were not sufficient evidence, Judge Vela would have directed a verdict of acquittal and this matter would not --

MR. YZAGUIRRE: We ask for mistrial on that, Your Honor. Now that is --

THE COURT: Objection is overruled. Motion is denied.

Ladies and gentlemen of the jury, any time that the attorneys make reference to the law and it is not consistent with that which I give you, you are to disregard what the attorneys told you.

MR. CISNEROS: With all due respect to this honorable jury, I strongly object on the grounds that he has implanted in the minds of these jurors the Court has determined that there is sufficient evidence to convict, Your Honor. At this time we ask the Court to instruct the jury to disregard that comment.

THE COURT: Request is denied.

MR. CISNEROS: Now we move for a mistrial.

THE COURT: Request is denied.

MR. YZAGUIRRE: Note our exception.

MR. MILNER: I feel compelled to complete my remark because it was incomplete. Were there not sufficient evidence, which if you believe it to be true, could support a verdict of guilty in

this case, the matter would not be before you. Now, whether you believe it or not --

MR. CISNEROS: Again object.

MR. YZAGUIRRE: Please caution the U.S. Attorney --

MR. CISNEROS: I ask the Court again to instruct the jury to disregard vigorously and also, Your Honor, at this time move for mistrial?

THE COURT: Denied. Objection is overruled.

MR. CISNEROS: My request for mistrial is also denied?

THE COURT: Denied.

MR. MILNER: You heard all the testimony. You decide whether the Defendant Moraida's guilt has been shown beyond a reasonable doubt. If you feel that it has, find so. If you don't, find him not guilty. No one is going to quarrel with your verdict.

Finally, with respect to Defendants Noe Muniz, Gary Ben Jordan, Humberto Sergio Garza and Fernando Pena. The battle lines are clearly drawn here. It is not even a matter of how do we interpret the evidence. It is a matter of black and white. Either they are lying or all the Government's witnesses are lying.

It is as simple as that. There is no in-between, middle ground.

Discussion

We will not overturn a conviction because of a prosecutor's jury argument unless the prosecutor's remarks were both inappropriate and harmful. United States v. Chase, 838 F.2d 743, 749 (5th Cir. 1988). As this court has previously stated, "[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." United States v. Lowenberg, 853 F.2d 295, 302 (5th Cir. 1988). Rather, we must analyze the closing argument in the context of the entire case to determine whether it affected substantial rights of the accused. See Chase at 749. We must decide whether as a result of the prosecutor's remarks serious doubt is cast on the correctness of the jury's verdict. United States v. Jones, 839 F.2d 1041, 1049 (5th Cir. 1988). In reaching this decision,

we must consider: "1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and 3) the strength of the evidence of the defendants' guilt." United States v. Iredia, 866 F.2d 114, 117 (5th Cir. 1989).

Applying these criteria to the instant case we find that, though the prosecutor's remarks were inappropriate, they were not harmful to the appellants. The prosecutor's statements were made in direct response to the argument made by counsel for Moraida. The prosecutor specifically referred to and confined the comments here complained of to defendant Moraida. Only later did he mention defendants Jordan, Garza, and Muniz. There was a clear break between the end of the prosecutor's arguments regarding defendant Moraida and the beginning of his arguments regarding defendants Jordan, Garza and Muniz. Defendants Jordan, Garza, and

Muniz, were not prejudiced by the prosecutor's improper statements.

Further, the district judge cautioned the jury at the time the statements were made. In addition, at the close of the arguments, the district judge further instructed the jury:

> Remember I told you that what the attorneys told you in their opening statements was not evidence and what the attorneys told you in their final arguments was not evidence. When we began this trial I had no opinion. If ever during the course of this trial I gave you any reason to believe that I had an opinion about the case, you were to disregard it. As a matter of fact, I suppose under Federal rules I could possibly express an opinion. But I consider that to be an invasion of what is exclusively your province. So if I engaged in any conduct that caused you to believe that I had an opinion about this case, you are to disregard it.

These instructions effectively eliminated any prejudicial effect the prosecutor's statements might have had on the appellants.

Finally, there was sufficient evidence of appellants' guilt to sustain the jury's verdict. The prosecutor's statements were harmless.

We have examined the other contentions raised by the appellants and conclude that they do not merit discussion.

AFFIRM.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-2485

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUMBERTO SERGIO GARZA,
GARRY BEN JORDAN, and
NOE MUNIZ, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(November 27, 1989)

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gee
United States Circuit Judge

United States of America vs. HUMBERTO SERGIO GARZA, DEFENDANT	United States District Court for the SOUTHERN DISTRICT OF TEXAS McALLEN DIVISION DOCKET NO. M-87-17-03

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date May 3, 1988

COUNSEL

X WITH COUNSEL Joe A. Cisneros

PLEA

X NOT GUILTY on December 23, 1987, at to Cts. 1 and 20-41.

FINDING & JUDGMENT

There being a verdict of X GUILTY. on April 1, 1988, as to Cts. 1,20-23,& 25-40.

Defendant has been convicted as charged of the offense(s) of Conspiracy to make false statements and representations to a federally licensed firearms dealer, in violation of 18 USC 924(a) and 371, on Count 1; and Making false statements and representations to a federally licensed firearms dealer, in violation of 18 USC 924(a) and 2, on Counts 20-23, and 25-40.

DATE OFFENSE COMMITTED: From on or about 12/15/82 to 4/10/86.

SEE PAGE 2 OF THIS INDICTMENT

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 1. 5 yrs. and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 20; said sentence in Count 20 to run consecutively to the sentence imposed in Count 1. 5 years and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 21; imprisonment portion (5 years) of said

sentence in Count 21 to run concurrently, while the 179-day confinement and the $1,000 fine run consecutively, to the sentences imposed in Counts 1 and 20. 5 years and a $1,000 fine; execution of the imprisonment sentence suspended for 5 years probation with supervision, as to Counts 22, 23, and 25-40; said terms to run concurrently to each other and to Counts 1, 20, and 21, with the exception of the $1,000 fines, which are to run consecutively to each other and to Counts 1, 20, and 21. Total sentence to be imposed is 10 years custody of the Attorney General and a $21,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision, to commence upon release from confinement.

SPECIAL CONDITIONS OF PROBATION

The Court further orders the following terms and special conditions of probation: Timely payment of the $21,000 fine as directed by the U.S. Probation Officer.

The Court further imposes a $50.00 special monetary assessment on each of Counts 1, 22, 23, 26, 30-33, 37, 39, and 40, for a total of $550, pursuant to 18 USC 3013. On

motion of the Government, Counts 24 and 41 were dismissed as to this defendant on March 28, 1988.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

APPROVED AS TO FORM:
/s/

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
X U.S. District Judge

/s/ Filemon B Vela
Honorable Filemon B. Vela
Date 5/9/88

United States of America vs.
GARRY BEN JORDAN
DEFENDANT

United States District Court for the SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION
DOCKET NO. M-87-17-04

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date May 3, 1988

COUNSEL

X WITH COUNSEL Joe A. Cisneros

PLEA

X NOT GUILTY on December 23, 1987, at to Counts 1-19.

FINDING & JUDGMENT

There being a verdict of X GUILTY. on April 1, 1988, as to Counts 1-18.

Defendant has been convicted as charged of the offense(s) of Conspiracy to make false statements and representations to a federally licensed firearms dealer, in violation of 18 USC 924(a) and 371, on Count 1; and Making false statements and representations to a federally licensed firearms dealer, in violation of 18 USC 924(a) and 2, on Counts 2-19.

DATE OFFENSE COMMITTED: From on or about 12/15/82 to 4/10/86.

SEE PAGE 2 OF THIS INDICTMENT

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 1. 5 yrs. and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 2; said sentence in Count 2 to run consecutively to the sentence imposed in Count 1. 5 years and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 3; imprisonment portion (5 years) of said sentence in

Count 3 to run concurrently, while the 179-day confinement and the $1,000 fine run consecutively, to the sentences imposed in Counts 1 and 2. 5 years and a $1,000 fine; execution of the imprisonment sentence suspended for 5 years probation with supervision, as to Counts 4-18; said terms to run concurrently to each other and to Counts 1, 2 and 3, with the exception of the $1,000 fines, which are to run consecutively to each other and to Counts 1, 2, and 3. Total sentence to be imposed is 10 years custody of the Attorney General and a $18,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision, to commence upon release from confinement.

SPECIAL CONDITIONS OF PROBATION

The Court further orders the following terms and special conditions of probation: Timely payment of the $18,000 fine as directed by the U.S. Probation Officer.

The Court further imposes a $50.00 special monetary assessment on each of Counts 1-3, 7, 8, 10, and 14-18, for a total of $550, pursuant to 18 USC 3013. On motion of the Government, Count 19 was

dismissed as to this defendant on March 28, 1988.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

APPROVED AS TO FORM:
/s/

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
X U.S. District Judge

/s/ Filemon B Vela
Honorable Filemon B. Vela
Date 5/9/88

United States of America vs. NOE MUNIZ, DEFENDANT	United States District Court for the SOUTHERN DISTRICT OF TEXAS McALLEN DIVISION DOCKET NO. M-87-17-06

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date May 3, 1988

COUNSEL

X WITH COUNSEL Joe A. Cisneros

PLEA

X NOT GUILTY on December 23, 1987, at to Counts 1 and 42-59.

FINDING & JUDGMENT

There being a verdict of X GUILTY. on April 1, 1988, as to Cts. 1 and 42-59.

Defendant has been convicted as charged of the offense(s) of Conspiracy to make false statements and representations to a federally licensed firearms dealer, in violation of 18 USC 924(a) and 371, on Count 1; and Making false statements and representations to a federally licensed firearms dealer, in violation of 18 USC 924(a) and 2, on Counts 42-59.

DATE OFFENSE COMMITTED: From on or about 12/15/82 to 4/10/86.

SEE PAGE 2 OF THIS INDICTMENT

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 1. 5 yrs. and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 42; said sentence in Count 42 to run consecutively to the sentence imposed in Count 1. 5 years and a $1,000 fine; 179 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision on Count 43; imprisonment portion (5 years) of said

sentence in Count 43 to run concurrently, while the 179-day confinement and the $1,000 fine run consecutively, to the sentences imposed in Counts 1 and 42. 5 years and a $1,000 fine; execution of the imprisonment sentence suspended for 5 years probation with supervision, as to Counts 44-59; said terms to run concurrently to each other and to Counts 1, 42, and 43, with the exception of the $1,000 fines, which are to run consecutively to each other and to Counts 1, 42, and 43. Total sentence to be imposed is 10 years custody of the Attorney General and a $19,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for 5 years probation with supervision, to commence upon release from confinement.

SPECIAL CONDITIONS OF PROBATION

The Court further orders the following terms and special conditions of probation: Timely payment of the $19,000 fine as directed by the U.S. Probation Officer.

The Court further imposes a $50.00 special monetary assessment on each of Counts 1, 43, 51-57, and 59, for a total of $500.00, pursuant to 18 USC 3013.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

APPROVED AS TO FORM:
/s/ _____

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
X U.S. District Judge

/s/ Filemon B Vela
Honorable Filemon B. Vela
Date 5/9/88

NO. 88-2485

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPEAL OF CRIMINAL NO. M-87-17	FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS McALLEN DIVISION

THE UNITED STATES OF AMERICA,	PLAINTIFF-APPELLEE
VS.	
HUMBERTO SERGIO GARZA GARY BEN JORDAN NOE MUNIZ	DEFENDANTS-APPELLANTS

APPELLANTS' FIRST PETITION FOR
PANEL REHEARING

TO THE HONORABLE COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Each of the above appellants files this petition seeking a rehearing in this cause, for the following reasons:

FIRST REHEARING POINT

The court of appeals reversibly erred in finding (Slip Opinion at 5) the prosecutor's challenged statements were harmless, when the prosecutor's heated use in the jury's presence of the imprimatur of the trial judge's legal sufficiency finding is just too prejudicial as to not cast serious doubt on the correctness of the verdict rendered after the jury rejected the appellant's testimony and opted to believe the Government's witnesses.

SECOND REHEARING POINT

The court of appeals reversibly erred in finding (Slip Opinion at 5) there was sufficient evidence of appellants' guilt to sustain the jury's verdict, when as to each appellant the evidence was insufficient to support conviction on at least one count as pointed out in appellants' original point of error no. 4.

THIRD REHEARING POINT

The court of appeals reversibly erred in effectively overruling appellants' original points of error nos. 2, 3 and 4 for:

A. there was jury misconduct that tainted the panel and necessitated a new trial;

B. the special assessment law is unconstitutional and appellants' ought not to be required $50 per count of conviction; and/or

C. there was insufficient evidence to support at least one conviction of each appellant.

ARGUMENT

Appellants hereby incorporate each argument advanced in their original brief which is on file with the court of appeals.

PRAYER

For the foregoing reasons, appellants respectfully request this Honorable Court to grant rehearing, reverse the appellants'

convictions and remand the case with adequate instructions.

Respectfully submitted this 8th day of November, 1989.

Respectfully submitted by
Appellant's Attorneys,

/s/
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(512) 687-8217

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CERTIFICATE OF SERVICE

I, JOSEPH A. CONNORS III, certify that on this the 8th day of November, 1989, three true copies of the foregoing Appellants' First Petition For Panel Rehearing were mailed to Appellee's attorney of record, Mr. Henry K. Oncken, United States Attorney,

Attn: Ms. Paula C. Offenhauser at Appellate Division, P.O. Box 61129, Houston, Texas 77208-1129; and one true copy thereof to appellants.

/s/
JOSEPH A. CONNORS III

No. 88-2485

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPEAL OF CRIMINAL NO. M-87-17

FROM UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS McALLEN DIVISION

THE UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

VS.

HUMBERTO SERGIO GARZA
GARY BEN JORDAN
NOE MUNIZ

DEFENDANTS-APPELLANTS

[Note: In that brief, the appellants' four points of error read as follows: see next page]

POINT OF ERROR NO. 1

The district court reversibly erred in refusing to grant a mistrial upon the prosecutor's improper statement during final argument (18R. 2000).

POINT OF ERROR NO. 2

The district court erred on failing to grant appellant's mistrial request upon jury misconduct (16R. 1845-1854). (See also 13R. 1239-1245; 14R. 1499-1501; 17R. 1806-1854; 16R. 1727-1731).

POINT OF ERROR NO. 3

As to each appellant, the district court reversibly erred in imposing a $50.00 special monetary assessment pursuant to 18 U.S.C. 3013 (1R. 168-171b), since that 1984 revenue——raising special assessment measure, which originated in the Senate, is in violation of the U.S. Constitution's Article 1, § 7, cl. 1, which provides all revenue bills must originate in the House.

POINT OF ERROR NO. 4

The evidence is insufficient to support a conviction under Counts 4, 5, 7, 8 (against Jordan), 27 (against Garza), and 44, 48, 49, 50, 51, 52 (against Muniz).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
McALLEN DIVISION

UNITED STATES OF AMERICA,	§	
	§	
PLAINTIFF	§	
V.	§	
	§	
MARGARITO ALVAREZ,	§	
URBANO ARREDONDO III,	§	
HUMBERTO SERGIO GARZA,	§	CRIMINAL NO.
GARRY BEN JORDAN,	§	M-87-17
JOSE FERNANDO MORAIDA,	§	
NOE MUNIZ,	§	
VICTOR MUNOZ,	§	
FERNANDO PENA, and	§	
CIRO ANGEL RIVERA,	§	
	§	
DEFENDANTS	§	

INDICTMENT

The Grand Jury Charges:

COUNT ONE

From on or about December 15, 1982, to on or about April 10, 1986, in the Southern District of Texas and within the jurisdiction of the Court, Defendants

MARGARITO ALVAREZ,
URBANO ARREDONDO III,
HUMBERTO SERGIO GARZA,
GARRY BEN JORDAN,
JOSE FERNANDO MORAIDA,
NOE MUNIZ,
VICTQR MUNOZ,
FERNANDO PENA, and
CIRO ANGEL RIVERA, coconspirators,

did knowingly and willfully conspire and agree together with Alejandro Barrera, Roberto Escobar, Fidel Galvan, Luis Angel Gonzales, Roel Gonzales, Grisel M. Marks, Juan Angel Morales, Juan Angel Ramos, Jr., Luis Alonzo Ramos, Jose Francisco Rodriguez, Benjamin Rosa, and Jesus Rosa, coconspirators not named as defendants, and with other persons unknown to the grand jurors, to violate Title 18, United States Code, Section 924(a), that is, to knowingly make false statements and representations with respect to the information required by the provisions of Chapter 44 of Title 18, United States Code, to be kept in the records of Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, a federally licensed firearms dealer.

NAMES AND MEANS

It was a part of the conspiracy that Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, CIRO ANGEL RIVERA, and VICTOR MUNOZ would recruit persons to sign ATF Forms 4473 as the purported transferees (buyers) of firearms from Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, who was licensed as a dealer in firearms under Chapter 44 of Title 18, United States Code.

It was a part of this conspiracy that these persons who were recruited to sign the ATF Forms 4473 as the purported transferees (buyers) of firearms would be paid money for their services and signatures.

It was further a part of this conspiracy that Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, NOE MUNIZ, FERNANDO PENA, and URBANO ARREDONDO III, in their capacities as salesmen for said licensed firearms dealer, would sign the said ATF

Forms 4473 as the transferors (sellers) of the described firearms, thereby falsely stating and representing that the described firearms were sold and delivered to the persons named on the said ATF Forms 4473, as the transferees (buyers), when in truth and in fact such firearms were not sold and delivered to the persons named as the transferees (buyers) on the said ATF Forms 4473.

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the coconspirators committed overt acts, including the following:

1. On or about June 15, 1984, Defendant JOSE FERNANDO MORAIDA, as the purported transferee (buyer), signed one (1) ATF Form 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas.

2. On or about June 15, 1984, in Roma, Texas, Defendant HUMBERTO SERGIO GARZA, in his capacity as a salesman, signed the ATF Form 4473 described in Overt Act #1 as the transferor (seller) of the firearm described on the form, thereby falsely stating and representing that such firearm was sold and delivered to Defendant JOSE FERNANDO MORAIDA, when in fact the firearm was delivered to Defendant MARGARITO ALVAREZ, a convicted felon.

3. Between on or about December 15, 1982, and on or about February 25, 1985, Jesus Rosa was recruited by an unknown person to sign, as the purported transferee (buyer), six (6) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway

83, Roma, Texas, for which signatures he was paid approximately $100.00.

4. Between on or about December 15, 1982, and on or about February 25, 1985, Defendants GARRY BEN JORDAN and HUMBERTO SERGIO GARZA, in their capacities as salesman for said licensed firearms dealer, later signed the ATF Forms 4473 described in Overt Act #3 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Jesus Rosa.

5. Between on or about May 24, 1983, and on or about February 13, 1985, Roel Gonzales was recruited by Defendant CIRO ANGEL RIVERA to sign, as the purported transferee

(buyer), six (6) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, for which signatures Roel Gonzales was paid $40.00 apiece.

6. Between on or about May 24, 1983, and on or about February 13, 1985, Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, and NOE MUNIZ, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #5 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Roel Gonzales.

7. Between on or about August 24, 1983, and on or about November 8,

1983, Grisel M. Marks was recruited by Defendants VICTOR MUNOZ and GARRY BEN JORDAN to sign, as the purported transferee (buyer), four (4) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, for which she was paid $100.00 by Defendant VICTOR MUNOZ.

8. Between on or about August 24, 1983, and on or about November 8, 1983, Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, and NOE MUNIZ, in their capacities as salesmen for said licensed firearms dealer, later signed the ATF Forms 4473 described in Overt Act #7 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing

that such firearms were sold and delivered to Grisel M. Marks.

9. Between on or about October 28, 1983, and on or about July 10, 1984, Roberto Escobar was recruited by Defendant GARRY BEN JORDAN to sign, as the purported transferee (buyer), six (6) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas.

10. Between on or about October 28, 1983, and on or about July 10, 1984, Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, and NOE MUNIZ, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #9 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and

representing that such firearms were sold and delivered to Roberto Escobar.

11. Between on or about December 18, 1983, and on or about May 28, 1985, Fidel Galvan was recruited by Defendant GARRY BEN JORDAN to sign, as the purported transferee (buyer), ten (10) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, for which Fidel Galvan was given a television set.

12. Between on or about December 18, 1983, and on or about May 28, 1985, Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, NOE MUNIZ, FERNANDO PENA, and URBANO ARREDONDO III, in their capacities as salesmen for said licensed firearms dealer, signed the ATF

Forms 4473 described in Overt Act #11 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Fidel Galvan.

13. Between on or about May 21, 1984, and on or about February 6, 1985, Benjamin Rosa was recruited by an unknown person to sign, as the purported transferee (buyer), six (6) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, for which signatures he was paid $150.00.

14. Between on or about May 21, 1984, and on or about February 6, 1985, Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, and NOE MUNIZ, in their capacities as

salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #13 as the tranferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Benjamin Rosa.

15. Between on or about July 28, 1984, and on or about August 29, 1984, Alejandro Barrera was recruited by an unknown person to sign, as the purported transferee (buyer), two (2) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, for which signatures he was paid $100.00.

16. Between on or about July 28, 1984, and on or about August 29, 1984, Defendants GARRY BEN JORDAN and

HUMBERTO SERGIO GARZA, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #15 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Alejandro Barrera.

17. Between on or about August 26, 1984, and on or about January 7, 1985, Luis Angel Gonzales was recruited by Defendant CIRO ANGEL RIVERA to sign, as the purported transferee (buyer), five (5) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas.

18. Between on or about August 26, 1984, and on or about January 7, 1985, Defendants GARRY BEN JORDAN,

HUMBERTO SERGIO GARZA, and NOE MUNIZ, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #17 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Luis Angel Gonzales.

19. Between on or about November 3, 1984, and on or about September 3, 1985, Jose Francisco Rodriguez was recruited by Defendant CIRO ANGEL RIVERA to sign, as the purported transferee (buyer), four (4) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, for which signatures Jose

Francisco Rodriguez was paid $40.00 per form.

20. Between on or about November 3, 1984, and on or about September 3, 1985, Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, and NOE MUNIZ, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #19 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Jose Francisco Rodriguez.

21. Between on or about November 9, 1984, and on or about March 28, 1985, Juan Angel Ramos, Jr., was recruited by Defendant CIRO ANGEL RIVERA to sign, as the purported transferee (buyer), six (6) blank

ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, for which signatures Juan Angel Ramos, Jr., was paid $40.00 each.

22. Between on or about November 9, 1984, and on or about March 28, 1985, Defendants GARRY BEN JORDAN, HUMBERTO SERGIO GARZA, and NOE MUNIZ, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #21 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Juan Angel Ramos, Jr.

23. Between on or about December 10, 1984, and on or about December 29, 1984, Juan Angel Morales was

recruited by Defendants CIRO ANGEL RIVERA to sign, as the purported transferee (buyer), two (2) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas.

24. Between on or about December 10, 1984, and on or about December 29, 1984, Defendants GARRY BEN JORDAN and HUMBERTO SERGIO GARZA, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #23 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Juan Angel Morales.

25. Between on or about December 28, 1984, and on or about February 6,

1985, Antonio Rodriguez was recruited by an unknown person to sign, as the purported transferee (buyer), two (2) blank ATF Forms 4473 at Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas.

26. Between on or about December 28, 1984, and on or about February 6, 1985, Defendants GARRY BEN JORDAN and HUMBERTO SERGIO GARZA, in their capacities as salesmen for said licensed firearms dealer, signed the ATF Forms 4473 described in Overt Act #25 as the transferors (sellers) of the firearms described on the forms, thereby falsely stating and representing that such firearms were sold and delivered to Antonio Rodriguez.

[Violation: Title 18, United States Code, Section 371]

COUNTS TWO through NINETEEN

On or about the following dates, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

GARRY BEN JORDAN

did knowingly make false statements and representations with respect to information required by the provisions of Chapter 44, Title 18, United States Code, to be kept in the records of Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, a federally licensed firearms dealer, in that he did falsely state and represent on the following Department of the Treasury, ATF Forms 4473, that the following described firearms were sold and delivered on or about said dates to the following persons named on the forms as transferees (buyers), when in truth and in fact, as Defendant GARRY BEN JORDAN well

knew, said firearms were not sold and delivered to the persons named as the transferees (buyers) of the firearms on the said ATF Forms 4473.

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
2	02-25-85	Jesus Rosa	Clayco Sports, AKS rifle, 7.62 x 39 cal., Ser.# 105322
3	11-20-84	Roel Gonzales	Colt, AR15 rifle, .223 cal., Ser.# SP 210414
4	08-24-83	Grisel M. Marks	Colt, AR15 rifle, .223 cal., Ser.# SP 194122
5	11-08-83	Grisel M. Marks	Colt, AR15 rifle, .223 cal., Ser.# SP 197146
6	05-12-84	Roberto Escobar	Colt, AR15 rifle, .223 cal., Ser.# SP 206562
7	12-15-84	Fidel Galvan	Colt, AR15 rifle, .223 cal., Ser.# SP 210448
8	02-26-85	Fidel Galvan	Winchester, 12 gauge shotgun Ser.# L1344403

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
9	05-21-84	Benjamin Rosa	Colt, .38 Super cal. pistol, Ser.# 80BS27948
10	02-06-85	Benjamin Rosa	Colt, .380 cal. pistol, Ser.# RC19800
11	08-29-84	Alejandro Barrera	Colt, AR15 rifle, .223 cal., Ser.# SP 208062
12	10-10-84	Luis Angel Gonzales	Colt, .38 Super cal. pistol, Ser.# 70S50457
13	11-02-84	Luis Angel Gonzales	Colt, AR15 rifle, .223 cal., Ser.# SP 211021
14	09-03-85	Jose Francisco Rodriguez	Colt, AR15 rifle, .223 cal., Ser.# SP 210316
15	11-29-84	Juan Angel Ramos, Jr.	Colt, AR15 rifle, .223 cal., Ser.# SP 210717
16	01-28-85	Juan Angel Ramos, Jr.	Colt, AR15 rifle, .223 cal., Ser.# SP 211191
17	03-28-85	Juan Angel Ramos, Jr.	Colt, AR15 rifle, .223 cal., Ser.# SP 212015

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
18	12-29-84	Juan Angel Morales	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 105308
19	12-28-84	Antonio Rodriguez	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 101336

Defendant CIRO ANGEL RIVERA did unlawfully, knowingly, and willfully aid, abet, induce, and procure the commission of the offenses set out in Counts Three, Twelve, Thirteen, and Fifteen through Eighteen.

Defendant VICTOR MUNOZ did unlawfully, knowingly, and willfully aid, abet, induce, and procure the commission of the offenses set out in Counts Four and Five.

[Violation: Title 18, United States Code, Section 924(a) and 2]

COUNTS TWENTY through FORTY-ONE

On or about the following dates, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

HUMBERTO SERGIO GARZA

did knowingly make false statements and representations with respect to information required by the provisions of Chapter 44, Title 18, United States Code, to be kept in the records of Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, a federally licensed firearms dealer, in that he did falsely state and represent on the following Department of the Treasury, ATF Forms 4473, that the following described firearms were sold and delivered on or about said dates to the following persons named on the forms as transferees (buyers), when in truth and in fact, as Defendant HUMBERTO SERGIO GARZA well knew, said firearms were not sold and delivered to the persons named as the transferees (buyers) of the firearms on the said ATF Forms 4473.

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
20	06-15-84	Jose Fernando Moraida	Browning, 12 gauge shotgun, Ser.#03803PW211
21	03-18-84	Jesus Rosa	Pietro Beretta, .380 cal. pistol, Ser.# B93089Y
22	11-18-84	Jesus Rosa	Colt, .38 Super cal. pistol, Ser.# 80BS27665
23	11-30-84	Jesus Rosa	Colt, .38 Super cal. pistol, Ser.# FG36459
24	05-24-83	Roel Gonzales	Jennings .22 cal. pistol, Ser.# 043227
25	06-14-84	Roel Gonzales	Colt, AR15 rifle, .223 cal., Ser.# SP 208848
26	02-13-85	Roel Gonzales	Colt, .380 cal. pistol, Ser.# RC 37784
27	10-27-83	Grisel M. Marks	Colt, AR15 rifle, .223 cal., Ser.# SP 197112
28	10-28-83	Roberto Escobar	Colt, AR15 rifle, .223 cal., Ser.# SP 192868

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
29	12-10-83	Roberto Escobar	Colt, AR15 rifle, .223 cal., Ser.# SP 192923
30	01-28-85	Fidel Galvan	Browning, 9MM pistol, Ser.#425PY08980
31	12-10-84	Benjamin Rosa	Colt, AR15 rifle, .223 cal., Ser.# SP 210329
32	12-28-84	Benjamin Rosa	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 104658
33	12-28-84	Benjamin Rosa	Colt, .38 Super cal. pistol, Ser.# 80BS23071
34	07-28-84	Alejandro Barrera	Colt, AR15 rifle, .223 cal., Ser.# SP 209927
35	08-26-84	Luis Angel Gonzales	Colt, AR15 rifle, .223 cal., Ser.# SP 209935
36	11-03-84	Jose Francisco Rodriguez	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 102160

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
37	11-29-84	Jose Francisco Rodriguez	Colt, AR15 rifle, .223 cal., Ser.# SP 210483
38	11-09-84	Juan Angel Ramos, Jr.	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 102340
39	12-15-84	Juan Angel Ramos, Jr.	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 105000
40	12-10-84	Juan Angel Morales	Colt, AR15 rifle, .223 cal., Ser.# SP 210511
41	02-06-85	Antonio Rodriguez	Colt, AR15 rifle, .223 cal., Ser.# 212499

Defendant CIRO ANGEL RIVERA did unlawfully, knowingly, and willfully aid, abet, induce, and procure the commission of the offenses set out in Counts Twenty-Four through Twenty-Six, Thirty-Five, and Thirty-Eight through Forty.

Defendant VICTOR MUNOZ did unlawfully, knowingly, and willfully aid, abet, induce, and procure the commission of the offense set out in Count Twenty-Seven.

[Violation: Title 18, United States Code, Section 924(a) and 2]

COUNTS FORTY-TWO through FIFTY-NINE

On or about the following dates, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

NOE MUNIZ

did knowingly make false statements and representations with respect to information required by the provisions of Chapter 44, Title 18, United States Code, to be kept in the records of Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, a federally licensed firearms dealer, in that he did falsely state and represent on the following Department of the Treasury, ATF Forms 4473, that the following described firearms were

sold and delivered on or about said dates to the following persons named on the forms as transferees (buyers), when in that in truth and in fact, as Defendant NOE MUNIZ well knew, said firearms were not sold and delivered to the persons named as the transferees (buyers) of the firearms on the said ATF Forms 4473.

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
42	07-20-84	Roel Gonzales	Colt, .38 Super cal. pistol, Ser.# FG24755
43	11-29-84	Roel Gonzales	Colt, AR15 rifle, .223 cal., Ser.# SP 210343
44	10-17-83	Grissel M. Marks	Colt, AR15 rifle, .223 cal., Ser.# SP 197086
45	11-05-83	Roberto Escobar	Colt, AR15 rifle, .223 cal., Ser.# SP 192884
46	11-15-83	Roberto Escobar	Colt, AR15 rifle, .223 cal., Ser.# SP 193364

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
47	07-10-84	Roberto Escobar	Colt, AR15 rifle, .223 cal., Ser.# SP 190676
48	12-28-83	Fidel Galvan	Browning, 9MM pistol, Ser.#245P275802
49	03-28-84	Fidel Galvan	Colt, .45 cal. pistol, Ser.# FG16592
50	10-18-84	Fidel Galvan	Colt, .38 Super cal. pistol, Ser.# 70S47609
51	02-13-85	Fidel Galvan	Browning, .380 cal. pistol, Ser.#425PY21876
52	04-10-85	Fidel Galvan	Mossberg, 12 gauge shotgun, Ser.# 5431416
53	11-20-84	Benjamin Rosa	Colt, .38 Super cal. pistol, Ser.# 80BS27168
54	11-30-84	Luis Angel Gonzales	Colt, AR15 rifle, .223 cal., Ser.# SP 211010
55	01-07-85	Luis Angel Gonzales	Interdynamic, 9MM cal. pistol, Ser.# 24719

COUNT	FORM 4473 DATE	TRANSFEREE (BUYER)	FIREARM
56	02-23-85	Jose Francisco Rodriguez	RB Industries, .25 cal. pistol, Ser.# 005895
57	12-03-84	Juan Angel Ramos, Jr.	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 104906
58	10-12-84	Juan Angel Morales	Browning, 9MM pistol, Ser.#245PY17267
59	06-28-85	Juan Angel Morales	Clayco Sports, AKS rifle, 7.62x39 cal., Ser.# 104502

Defendant CIRO ANGEL RIVERA did unlawfully, knowingly, and willfully aid, abet, induce, and procure the commission of the offenses set out in Counts Forty-Two, Forty-Three, Fifty-Four, Fifty-Five, and Fifty-Seven through Fifty-Nine.

Defendant VICTOR MUNOZ did unlawfully, knowingly, and willfully aid, abet, induce, and procure the commission of the offense set out in Count Forty-Four.

[Violation: Title 18, United States Code, Section 924(a) and 2]

COUNT SIXTY

On or about February 26, 1985, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

FERNANDO PENA

did knowingly and unlawfully make a false statement and representation with respect to information required by the provisions of Chapter 44, Title 18, United States Code, to be kept in the records of Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, a federally licensed firearms dealers, in that he did falsely state and represent on a Department of the Treasury, ATF Form 4473, that a Colt, AR15 rifle, .223 caliber, serial number SP 212788, was sold and delivered to Fidel Galvan, as transferee (buyer), when in truth and in fact, as Defendant FERNANDO PENA well knew, said

firearm was not sold and delivered to Fidel Galvan.

[Violation: Title 18, United States Code, Section 924(a)]

COUNT SIXTY-ONE

On or about May 28, 1985, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

URBANO ARREDONDO III

did knowingly and unlawfully make a false statement and representation with respect to information required by the provisions of Chapter 44, Title 18, United States Code, to be kept in the records of Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, a federally licensed firearms dealers, in that he did falsely state and represent on a Department of the Treasury, ATF Form 4473, that a Browning, 9MM pistol, serial number 245PZ65304, was sold and delivered to Fidel Galvan, as transferee (buyer), when in truth

and in fact, as Defendant URBANO ARREDONDO III well knew, said firearm was not sold and delivered to Fidel Galvan.

[Violation: Title 18, United States Code, Section 924(a)]

COUNT SIXTY-TWO

On or about June 15, 1984, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

JOSE FERNANDO MORAIDA

did knowingly and unlawfully make false statements and representations with respect to information required by the provisions of Chapter 44, Title 18, United States Code, to be kept in the records of Amando Pena, Riverview True Value Hardware & Family Center, 1005 East Highway 83, Roma, Texas, a federally licensed firearms dealer, in that he did falsely state and represent on a Department of Treasury, ATF Form 4473, that he was the purported transferee (buyer) of a Browning, 12 gauge shotgun, serial number

03803PW211, when in truth and in fact, as Defendant JOSE FERNANDO MORAIDA well knew, he was not the actual transferee for said firearm.

[Violation: Title 18, United States Code, Section 924(a)]

A TRUE BILL

/s/ Billy Friend
FOREMAN

HENRY K. ONCKEN
UNITED STATES ATTORNEY

/s/
CHRISTOPHER LEE MILNER
ASSISTANT UNITED STATES ATTORNEY

Supreme Court, U.S.
FILED
APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1397

3

In the Supreme Court of the United States

OCTOBER TERM, 1989

HUMBERTO SERGIO GARZA, GARY BEN JORDAN AND NOE MUNIZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the district court erred in refusing to grant a mistrial based on the prosecutor's closing argument.

2. Whether the district court erred in refusing to grant a mistrial based on an indirect attempt at jury tampering.

3. Whether 18 U.S.C. 3013, which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution.

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18 U.S.C. 924(a)	1-2
18 U.S.C. 3013	2, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1397

HUMBERTO SERGIO GARZA, GARY BEN JORDAN AND NOE MUNIZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-10) is reported at 887 F.2d 55.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1989. A petition for rehearing was denied on November 27, 1989 (Pet. App. 11-12). The petition for a writ of certiorari was filed on February 26, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on one count of conspiracy to make false statements to a federally licensed firearms dealer, in violation of 18 U.S.C. 371, and on multiple counts of aiding and abetting the making of such false statements, in violation of 18 U.S.C.

924(a).[1] Each petitioner was sentenced to five years' imprisonment on the conspiracy count, a consecutive term of five years' imprisonment on one of the substantive counts, and concurrent five-year terms on each of the remaining substantive counts.[2] Each petitioner was also fined $1,000 on each count of conviction. A special assessment of $50 was imposed under 18 U.S.C. 3013 on selected counts of conviction.[3]

1. Petitioners were employees of a federally licensed firearms dealer, the Riverview True Value Home and Family Center, in Roma, Texas. They were authorized to sell weapons on behalf of the store. The evidence at trial showed that petitioners engaged in a conspiracy to sell numerous firearms, particularly assault rifles, without proper record-keeping. Petitioners paid persons to sign Part A of a federal firearms form (ATF Form 4473) in blank. That allowed petitioners to complete the form in a manner that would disguise the identity of the true purchaser of the firearm. Gov't C.A. Br. 5-13.

2. During trial, one of the jurors told the judge that she had been told by a friend that a court spectator had mentioned that the juror could "make a lot of money" if she would "turn for the other side." Gov't C.A. Br. 18. The court questioned the juror in chambers and confirmed that there had been no actual attempt at a bribe, and that the matter had not affected the juror's impartiality in any way. Each of the other jurors was questioned about the matter,

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[1] Petitioner Garza was convicted on 20 counts of violating 18 U.S.C. 924(a); petitioner Jordan was convicted on 17 counts; and petitioner Muniz was convicted on 18 counts.

[2] All but 537 days of each of petitioners' prison sentences was suspended.

[3] Petitioner Garza was fined $21,000 and specially assessed $550; petitioner Jordan was fined $18,000 and specially assessed $550; and petitioner Muniz was fined $19,000 and specially assessed $500.

and each said that his or her impartiality had not been affected. All members of the panel were retained as jurors. The court denied motions for a mistrial based on this incident. *Id.* at 18-21.

The prosecutor, during his rebuttal closing argument, responded to the closing argument made by counsel for defendant Moraida, who is not one of the petitioners. The prosecutor said:

> Mr. Ramirez indicated that there was not enough evidence from which any jury could convict the defendant, Moraida, and that if any jury convicted him, they would be convicting an innocent man. I am here to assure you that if there were not sufficient evidence, Judge Vela would have directed a verdict of acquittal * * *.
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> * * * * *
>
> Were there not sufficient evidence, which if you believe it to be true, could support a verdict of guilty in this case, the matter would not be before you * * *.

Pet. App. 4-6. The district court responded to an objection to this comment by instructing the jury to disregard comments by counsel that differed from the court's instructions. *Id.* at 5. Later, the court instructed the jury that the court expressed no opinion about the guilt or innocence of any defendant. *Id.* at 9. The court denied petitioners' motions for a mistrial based on the prosecutor's comment.

3. The court of appeals affirmed. Pet. App. 3-10. The court ruled that the improper comment by the prosecutor during closing argument was harmless error. The court reached that conclusion by considering the prejudicial effect of the prosecutor's statements, the court's curative instruction, and the evidence of petitioners' guilt. *Id.* at 8-10.

See generally *United States* v. *Iredia*, 866 F.2d 114, 117 (5th Cir.), cert. denied, 109 S. Ct. 3250 (1989).

Petitioners had briefed the jury-tampering issue and their claim that the special assessment statute, 18 U.S.C. 3013, violates the Origination Clause. The court of appeals resolved those claims by stating: "We have examined the other contentions raised by the [petitioners] and conclude that they do not merit discussion." Pet. App. 10.

ARGUMENT

1. Petitioners renew their contention (Pet. 23-31) that the prosecutor's remarks in closing argument required the court to declare a mistrial. Petitioners devote much of their discussion to the claim that the prosecutor's remarks were inappropriate. But the court of appeals agreed with petitioners that the prosecutor's argument was error, and we do not contest that conclusion. The only issue, therefore, is whether the court of appeals correctly held that the prosecutor's remarks were harmless beyond a reasonable doubt.

Petitioners' suggestion (Pet. 28) that a prosecutor's comments before the jury cannot be harmless error is belied by this Court's decision in *United States* v. *Hasting*, 461 U.S. 499 (1983). In that case, the Court held that a prosecutor's improper remarks about the defendant's failure to testify were harmless. *Id.* at 510-512. Likewise, the court of appeals in this case properly found that the prosecutor's remarks were harmless beyond a reasonable doubt. As the court noted, the prosecutor's remarks pertained to a defendant other than petitioners. See Pet. App. 8. Moreover, the trial court instructed the jury that, contrary to the prosecutor's implication, the judge did not have a personal opinion about the defendants' guilt or innocence. In light of the substantial evidence of petitioners' guilt, therefore, the

court of appeals was correct in ruling that the prosecutor's statements were harmless. *Id.* at 10.

2. Petitioners also contend (Pet. 31-34) that the apparent indirect attempt at jury tampering required a mistrial. That contention is mistaken. After the possible attempt to influence the jury was brought to the trial court's attention, the court conducted the appropriate fact-finding inquiry required by *Remmer* v. *United States*, 347 U.S. 227 (1954). The trial court credited the statements of each juror that he or she could render a fair and impartial verdict. Gov't C.A. Br. 19-21. And the court of appeals properly held that the trial court's findings were not clearly erroneous. Thus, no further review of that fact-specific claim is warranted.

3. Finally, petitioners maintain (Pet. 22-23) that the special assessment statute, 18 U.S.C. 3013, is unconstitutional and that they therefore should not have to pay the special assessments imposed in this case. They argue that the special assessment statute is a bill for raising revenue that originated in the Senate, in violation of the Origination Clause of the Constitution, Art. I, § 7, Cl. 1. That issue is now before the Court in *United States* v. *Munoz-Flores*, No. 88-1932 (argued Feb. 20, 1990). The resolution of that case will likely govern the proper disposition of the special assessments imposed in this case. Accordingly, the Court should hold this petition until it decides *Munoz-Flores*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Munoz-Flores*, No. 88-1932, and disposed of in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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